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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. [redacted] 159

AMERICAN EXPORT LINES, INC.,
Petitioner,

v.

HOWARD ALI AMMAR,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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AMERICAN EXPORT LINES, INC.,
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HOWARD ALI AMMAR,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above case on January 27, 1964.

Citations to Opinions Below

The opinion of the Circuit Court of Appeals printed in Appendix B hereto, infra, p. 3a, is reported in 326 F. 2d 955. The District Court opinion on damages, a matter not involved in this petition, printed in Appendix Record, Vol. I, p. 181a, was not officially reported.

Jurisdiction

The judgment of the United States Court of Appeals was entered on January 27, 1964. Rehearing was denied without opinion on March 11, 1964. The jurisdiction of this Court is invoked under 29 U. S. C. Section 1254 (1).

Question Presented

1. When a merchant seaman injured aboard ship is negligently involved in a motorcycling accident nearly 20 months later and then claims additional damages, is the shipowner entitled to a jury determination under the Jones Act of whether or not the subsequent harm was reasonably foreseeable?

2. When a merchant seaman injured aboard ship is negligently involved in a motorcycling accident nearly 20 months later and then claims additional damages, did the trial Judge commit error, as both parties urged on appeal, in charging the jury in terms of comparative negligence with respect to the second accident?

3. Is not this merchant seaman's riding a strange motorcycle at night while disabled from an independent unrelated groin injury such an intervening cause as to require the trial Judge to take the question of the ensuing damages from the jury?

Statutes Involved

The statutory provisions involved are sections 1 and 3 of the Federal Employer's Liability Act, 35 Stat. 65, 45 U.S.C. § 51; 35 Stat. 66, 45 U.S.C. § 53 and the Jones Act, 41 Stat. 1007, 46 U.S.C. § 688. They are printed in Appendix A, *infra*, pp. 1a and 2a.

Statement

The complaint was filed on October 14, 1960 to recover damages for personal injuries sustained by Howard Ali Ammar against his employer, American Export Lines, Inc., resulting from a shipboard accident on November 29, 1959, while Ammar was employed as a seaman on board the s/s Independence. After Ammar was injured on a motor-

cycle on July 20, 1961, the complaint was amended to recover additional damages for far more substantial injuries caused by the motorcycling accident. The case was tried from May 21, to May 29, 1963, before the Honorable Edward C. McLean and a jury resulting in a verdict for the plaintiff for the sum of $197,261.45 (Appendix Record, Vol. I, p. 12a). The jury awarded $11,000 for the shipboard accident of November 29, 1959 and the net sum of $183,725.40 for the motorcycle accident of July 20, 1961, finding plaintiff guilty of 59.64% contributory negligence (Appendix Record, Vol. I, pp. 152a and 153a). At the close of the testimony; the trial Judge expressly refused to instruct the jury in accordance with defendant's requests to charge on the concept of foreseeability and plaintiff's continuing duty to exercise reasonable care following his initial accident (Appendix Record, Vol. I, p. 149a). As to each accident the Judge's charge indicated awards should be made for the temporary and permanent conditions (Appendix, Vol. I, p. 144a). In charging the jury, the Judge also dealt separately with the unseaworthiness and negligence theories of liability. In his instructions on proximate cause under the unseaworthiness count, the concept of foreseeability was adequately covered by stating that the cause must not be a remote one, and it must be a cause unbroken by an efficient intervening cause (Appendix Record, Vol. I, p. 137a). However, the foregoing proximate cause definition was omitted from the Judge's explanation of proximate cause as it applied to the negligence theory (Appendix Record, Vol. I, p. 139a). Significantly, the jury was unable to reach an agreement on the unseaworthiness count, the explanation of which contained foreseeability instructions, but found the defendant liable on the negligence count, the explanation of which did not contain foreseeability instructions (Appendix Record, Vol. I, 151a).

REASONS FOR GRANTING THE WRIT

1. The Court of Appeals for the Second Circuit adopted a theory in conflict with the theory of causation recognized by both the Court of Appeals for the Fourth Circuit in *Boxers* v. *Seas Shipping Co.*, 185 F. 2d 352 (1950), and the Court of Appeals for the Seventh Circuit in *Repsholdt* v. *United States*, 205 F. 2d 852 (1953). Both these Courts dismissed libels brought by injured seamen under the Jones Act because each injured seaman failed to prove that a relatively minor accident was the "proximate cause" of a subsequent severe injury.

Significantly, the above courts also dismissed the maintenance and cure count, which requires no showing of fault, because of the seamen's failure to exercise reasonable diligence following his initial accident. In the *Boxers* case the Fourth Circuit refused to relate a fractured ankle sustained on January 27, 1949 to a knee injury on November 18, 1948 (at p. 354). In the *Repsholdt* case the Seventh Circuit refused to relate a fall on April 19, 1948 and a second fall in February of 1951 to a knee injury sustained on March 4, 1948 (at p. 857).

The necessity of a charge as to reasonably forseeable consequences is especially apt insofar as awards for permanency are concerned. Otherwise a jury's award for permanent conditions must relate to personal prejudice as well as to legal proof. Beyond this the jury's award for the first accident included, under the charge, damages for both temporary total and permanent partial disability (Appendix Record, Vol. I, p. 144a). The award for the second accident then, under the charge, provided a double recovery.

Finally, the opinion below is in conflict with the interpretation of the New York Court of Appeals of a liberal Workmen's Compensation Statute. In case of *Sullivan* v.

B. & A. Construction, 307 N. Y. 161 (1954), the court refused to relate an automobile accident occurring on June 30, 1950 to two earlier accidents on March 24, 1948 and June 17, 1949. Claimant had slipped on a paint brush and then fallen when a ladder broke, injuring and re-injuring his right knee. Then, while driving his car, the tie rod broke and his right knee "locked" preventing his applying the brake. The court held that while the earlier injuries may have been a "but for" cause of the accident, they certainly did not constitute the requisite legal or proximate cause. When claimant ignored his locking knee and without justification, continued to drive, responsibility for the accident and its consequences could no longer be ascribed to his employment-created disability. Had claimant been ignorant of the extent of his disability, had his knee not previously locked while driving, the case might conceivably have been different. However, it was indisputable that claimant's own act of driving, supervening between the industrial accidents and the car crash, broke the essential chain of causation. *Ibid.* p. 165.

2. The petitioner unquestionably has been deprived of a jury determination of a disputed question of fact vital to the case (Appendix B, p. 7a). This Court has repeatedly held that where jury trials are required, courts must submit the issue of negligence to a jury if the evidence might justify finding either way on this issue and certiorari has been repeatedly granted because of the importance the Court placed on the necessity of preserving for litigants in F.E.L.A. [and Jones Act] cases their right to a jury trial. *Wilkerson v. McCarthy*, 336 U. S. 53, 55 (1949). While the foregoing case, as well as those which follow, are all cases where the Court has found that plaintiffs were deprived of a jury determination, Mr. Justice

Douglas in his concurring opinion in *Wilkerson*, supra, pointed out that:

> "The criterion governing the exercise of our discretion in granting or denying certiorari is not who loses below but whether the jury function in passing on disputed questions of fact and in drawing inferences from the proven facts has been respected" at pp. 70-71.

On the trial of this action, petitioner submitted to the trial Judge certain instructions, requesting that they be given to the jury following the conclusion of all of the evidence. These instructions in general dealt with the foreseeability of a subsequent motorcycling accident and the circumstances surrounding this accident, as well as the plaintiff's continuing duty to exercise reasonable care following the initial shipboard accident up to and including the time of the motorcycle accident (Appendix Record, Vol. I, pp. 117a-24a). All of these requests were expressly denied by the trial Judge (Appendix Record, Vol. I, p. 149a). These denials resulted in the anomalous situation of requiring the jury to consider proximate cause in two different lights, for in his instructions, the trial Judge separately discussed the unseaworthiness and negligence theories of liability. As to the unseaworthiness, he explained that in order to constitute proximate cause, the cause must not only actually contribute to the result, but such a cause must not be a remote one and that it is a cause which in a natural and continuance sequence, unbroken by any efficient intervening cause, helps to produce the injury without which the accident would not have happened (Appendix Record, Vol. I, p. 137a). In explaining proximate cause as it applied to the Jones Act count, the Judge omitted all considerations of foreseeability, remoteness and efficient intervening cause (Appendix Record, Vol. I, p. 139a) The jury, of course,

was not able to reconcile these diverging definitions with the result that they could not reach an agreement on the question of unseaworthiness (Appendix Record, Vol. I, p. 151a), which on its face is an unusual eventuality, since this concept, requiring a greater degree of proof than negligence, has permitted recovery over an awesome spectrum of maritime cases. However, the separate definitions of proximate cause, at least, points up the fact that the trial Judge did not as a matter of law reach the conclusion that plaintiff's action in boarding the motorcycle was not an intervening efficient cause breaking the chain of proximate causation, notwithstanding the assertion to the contrary contained in the opinion below (Appendix B, p. 7a).

The Appellate Court agrees with petitioner "that the charge withdrew from the jury the question of remoteness of damages with respect to the negligence claim" (Appendix B, p. 7a). However, this area of agreement does not extend to a subsequent statement contained in the opinion below which holds that:

> "[A]lthough *Rogers* [v. *Missouri Pacific R. Co.*, 352 U. S. 500 (1957)] did not involve a subsequent accident, we think it excludes in Jones Act cases the application of causation analysis to limit liability for remote damages" [Appendix B, p. 8a].

On the contrary, the holding in the *Rogers* case, supra, not only sanctions causation analysis, but prohibits the exclusion of disputed questions of fact from the jury's consideration. Implicit in the Court's opinion reversing the Missouri Supreme Court and reinstating the jury verdict, is the fact that the jury was instructed on the foreseeability aspect of plaintiff's on-the-job accident. More importantly, the *Rogers* case did not strike from the F. E. L. A. the word *"negligence"*. Negligence is still the basis of re-

covery in F. E. L. A. [and Jones Act] cases and foreseeability remains an essential element of negligence. However, if the language of the *Rogers* case could have been interpreted to cast doubt on the fact that foreseeability was part of a Jones Act case, this doubt was resolved in the recent case of *Gallick* v. *Baltimore & Ohio R.R. Co.*, 372 U. S. 108 (1963), in which Mr. Justice White, speaking for the majority, stated unequivocably that foreseeability remains an essential ingredient of an F. E. L. A. case. He further explained that there are two aspects of the concept: foreseeability as to the extent of the injuries and foreseeability of harm. Only the latter remains viable in F. E. L. A. cases. Unlike the instant case, the underlying problem in the *Gallick* case was one involving the extent of plaintiff's injuries, which, as the Court points out, need not be foreseeable. In that case, the petitioner had been bitten by a mosquito, the bite subsequently became infected and the infection resulted in the amputation of both legs. Hence, the end result followed a natural sequence of events. Moreover, neither of the above decisions involved a subsequent accident which occurred during the recreational hours of a former employee, as did the accident with which we are here concerned.

Finally, the court below not only struck causation analysis from Jones Act cases, but extended the protection of the Statute even beyond the limitations of a liberal State Workmen's Compensation Act. In the case of *Sullivan* v. *B & A Construction Co.*, 307 N. Y. 161 (1954), the claimant, alleging a causal connection between a prior on-the-job accident and a subsequent accident, sought to recover an award under the New York State Workmen's Compensation Statute, for injuries flowing from a subsequent off-the-job automobile accident. The award was denied as a matter of law by reason of claimant's own negligence in attempting to operate his automobile. See also

Bowers v. *Seas Shipping Co.*, 185 F. 2d 352 (4 Cir. 1950); *Repsholdt* v. *United States*, 205 F. 2d 852 (7 Cir. 1953); *Snow* v. *New York, New Haven Hartford R. Co.*, 185 Mass. 321, 70 N. E. 205 (1904). Petitioner submits that striking causation analysis from the Jones Act and thus excluding such analysis from the jury's consideration renders the poignant words of Mr. Justice Brennan particularly apropos: "special and important reasons for the grant of certiorari in these cases are certainly present when lower Federal and State Courts persistently deprive litigants of their right to a jury determination". *Rogers*, supra, at p. 510.

2. The questions presented are also of overriding importance in the administration of the Jones Act and the Federal Employer's Liability Act. On the one hand, the opinion of the Court of Appeals for the Second Circuit affirms a novel and unprecedented application of the comparative negligence doctrine. The court below concedes that "neither the parties' research nor our own has disclosed any decision dealing * * *" with the question of whether the doctrine of comparative negligence should be applied to the damages of a subsequent accident (Appendix B, p. 10a). There is no authority for applying the doctrine of comparative negligence to this question because this equitable doctrine grew out of the Common Law concept of contributory negligence, which is today and always has been, applied to those acts of the plaintiff which are contemporaneous with the defendant's tortious conduct, which resulted in harm to plaintiff. It is at this time that a defendant's negligence ends. While a defendant may under certain circumstances be liable for subsequent damages, this liability is not decided on the basis of comparative negligence. In the instant case, petitioner's negligence ended with the occurrence of the shipboard accident at Madeira and 20

months later respondent failed to exercise due care in boarding a motorcycle in Long Island. This sequence of events gives rise to legal principles different from and alien to the doctrine of comparative negligence. The validity of this contention is patently apparent in the Statute (F. E. L. A., 45 U. S. C. §§ 51, 53 (1958). See also *Ellerman Lines, Limited* v. *The President Harding*, 288 F. 2d 288 at 290 (2d Cir. 1961), Clark, *New York Law of Damages*, (1925) § 113, pp. 203-205; *Murphy* v. *American Barge Line Co.*, 169 F. 2d 61, 64 (3 Cir. 1948).

In their briefs below not only petitioner but also respondent took the position that the doctrine of comparative negligence was an inappropriate vehicle for determining the rights of the parties with respect to the damages flowing from the motorcycle accident (Appendix B, p. 10a). Respondent contended that the amount of these damages should have been decided under the doctrine of "avoidable consequences". Petitioner urged that these rights should be determined in terms of foreseeability, efficient intervening cause or avoidable consequences (Appendix Record, Vol. I, pp. 117a-124a, Pet. for Rehearing pp. 5, 6, 9). In this context, any attempt to distinguish one of the foregoing concepts from the remaining two is but an exercise in semantics because the fact is that Howard Ali Ammar had a continuing duty to exercise reasonable care following his accident aboard ship. *Ellerman Lines, Ltd.* v. *The President Harding*, *Murphy* v. *American Barge Line Co.*, *supra*; Harper & James, *Law of Torts*, (1956) Vol. II, §§ 22.10, pp. 1231-32; 25.4, p. 1307; *Restatement of Torts*, Vol. IV § 918; Prosser, *Law of Torts* (2d Ed. 1955 p. 287; McCormick, *On Damages* (1935) § 33; Clark, *New York Law of Damages* (1925) § 113. To argue that the imposition of such a duty on a plaintiff is unjust and to liken it to the Common Law "all or nothing" concept of contributory negligence is to avoid meeting the problem. Upon a jury

finding of negligence with respect to the shipboard accident, plaintiff was clearly entitled to the damages flowing therefrom in the absence of contributory negligence. But the jury should have been permitted to consider the rights of the parties in accordance with the principles urged in the briefs as to the motorcycle accident damages. In the reply brief below, petitioner set forth at length the comments of the leading text writers with respect to the doctrine of avoidable consequences. The essence of these comments is succinctly set forth in the following quotation from Harper & James, *Law of Torts,* (1956) Vol. 2 § 22.10 pp. 1231-32:

> "The rule of avoidable consequences. * * * After the original impact or injury (to which plaintiff's negligence did not contribute), plaintiff's negligence may intervene to aggravate its consequences. * * * In cases like these plaintiff may not recover for that aggravation to his injury towards which his negligence contributes. This notion is sometimes referred to as the duty to mitigate damages or the rule of avoidable consequences".

Petitioner's requested instruction # 14, which was expressly denied by the trial Judge, embodies the substance of this doctrine:

> "If you find that under the circumstances, the riding of the motorcycle was negligent, then you must find for defendant with respect to the damages flowing from the second accident" [Appendix Record, Vol. I, p. 121a].

Obviously, defendant American Export Lines had no connection with the motorcycle accident outside plaintiff's home. The jury's finding of 59.64% comparative negligence (Appendix Record, Vol. I, p. 153a) indicates plaintiff's own fault was overwhelming. Under the charge as given defendant is liable for the negligence of any and

all others, such as that of the motorcycle owner, in connection with the motorcycle accident damages. In the light of the foregoing it is inescapable that under a proper charge the jury would have found for defendant with respect to the motorcycle accident.

On the other hand, the opinion below also contravenes the purpose of the Federal Statutes here involved. Although public policy requires the submission of seaman's and railway worker's injury claims to juries in the expectation that liability for awards will require employers to adopt safe working practices, it is unprecedented to hold liable an employer for a former employee's unregulated wholly disconnected recreational accident resulting in harm. The trial of this case clearly established that Howard Ali Ammar on the evening of July 20, 1961 was negligently involved in an accident following his decision to take a ride on a strange motorcycle belonging to a friend (Appendix Record, Vol. I, 38a, 39a). He not only did not know the location of the hand brake, but at the time was not fit for duty having been found so by a United States Public Health Service physician by reason of a prior unrelated groin injury (Appendix Record, Vol. I, pp. 46a, 50a; 112a). Respondent claims to have had recurrent "blackouts" following the 1959 shipboard accident and as a result of one of these "blackouts" lost control of the motorcycle. He testified that a scant two months before the motorcycle accident he had had a "blackout"; thus does not the fact that he boarded a motorcycle with this knowledge constitute the ultimate breach of his duty to exercise due care (Appendix Record, Vol. I, p. 37a). Congress intended these Statutes to serve as a means by which seaman and railroad workers could obtain compensatory judgments for on-the-job injuries. The statutes are not a form of health insurance. This protection is provided for by the Social Security Act and in New York State by the Disability Insurance Law. To extend the comparative

negligence doctrine of the Jones Act and the Federal Employer's Liability Act to shoreside vehicular accidents, as to which the defendants obviously have neither notice nor investigatory power, is but to invite litigation without merit.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Dated: New York, N. Y., June 4, 1964.

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APPENDIX A

Statutes Involved

Federal Employers' Liability Act:

Sec. 1, 35 Stat. 65 (1908), 45 U. S. C. § 51 (1958)

Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; definition of employees

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

Sec. 3, 35 Stat. 66 (1908), 45 U. S. C. § 53 (1958)

Contributory negligence; diminution of damages

In all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: *Provided*, That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

Jones Act, 41 Stat. 1007 (1920), 46 U. S. C. § 688 (1958)

Recovery for injury to or death of seaman

Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right to remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

APPENDIX B

(Opinion of Hays, *C. J.*)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 219—September Term, 1963.

(Argued December 12, 1963 Decided January 27, 1964.)

Docket No. 28479

HOWARD ALI AMMAR,

Plaintiff-Appellee,

—v.—

AMERICAN EXPORT LINES, INC.,

Defendant-Appellant.

BEFORE:

CLARK,* SMITH AND HAYS,

Circuit Judges.

Appeal from a judgment of the United States District Court for the Southern District of New York, Edward C. McLean, *Judge*, entered on a jury verdict in favor of a

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*The late Judge Charles E. Clark heard oral argument on this case but did not participate in its decision.

seaman in a suit under the Jones Act, 41 Stat. 1007 (1920), 46 U. S. C. § 688 (1958).

Affirmed.

ROBERT KLONSKY of DiCostanzo, Klonsky & Sergi, Brooklyn, New York, for Herman N. Rabson, *Attorney for Plaintiff-Appellee.*

JAMES M. ESTABROOK of Haight, Gardner, Poor & Havens, New York City (Hollis M. Walker, Jr., on the brief), *for Defendant-Appellant.*

HAYS, *Circuit Judge:*

Defendant shipowner, American Export Lines, appeals from a verdict of $197,261.45 rendered against it in favor of a seaman, Ammar, in a suit under the Jones Act, 41 Stat. 1007 (1920), 46 U. S. C. § 688 (1958). Plaintiff has filed a cross-appeal complaining of the reduction of damages because of plaintiff's contributory negligence and of the exclusion of certain home nursing expenses in the determination of defendant's liability for maintenance and cure.[1]

Plaintiff was the victim of two accidents. The first occurred on November 29, 1959, when he fell from a platform while working on his ship. The second occurred on July 20, 1961, some 20 months later, when he rode a motorcycle into

[1] Plaintiff does not press the point regarding home nursing expenses on this appeal. In any event the ruling below was proper. By making available to the seaman the free medical services afforded by the Marine Hospital service a shipowner may limit recovery to such maintenance and cure expenses as cannot be obtained by recourse to those services. The shipowner was not required in this case to honor the seaman's preference for private treatment. *Kossick* v. *United Fruit Co.*, 365 U. S. 731, 733 (1961); *Calmar S.S. Corp.* v. *Taylor*, 303 U. S. 525, 531 (1938).

a wall. Plaintiff's claim with respect to the second accident was that it was caused by a blackout which resulted from a brain injury incurred in the first accident.

The issue of liability for the first accident was submitted to the jury by special interrogatories on two theories, unseaworthiness and negligence. The jury was unable to agree on unseaworthiness, but found that defendant was negligent and that this negligence was the proximate cause of plaintiff's brain injury. The plaintiff was found free from contributory negligence with respect to the shipboard accident and damages were assessed at $11,000. As to this part of the action, there is no real controversy on this appeal.

After the shipboard accident and as a result of his brain injury plaintiff suffered recurrent blackouts. He was advised by Public Health Service doctors that the blackouts would eventually stop. The last blackout that he experienced prior to the motorcycle accident occurred two months before the accident, in May 1961. On July 20, 1961, plaintiff, who was not working because of an unrelated injury, mounted a friend's motorcycle, went into a skid from which he recovered, and, then, after traveling perhaps seventy feet, crashed into the wall of a house. Plaintiff explained that he had blacked out after coming out of the skid. Defendant introduced evidence to contradict plaintiff's claim that the motorcycle accident was the result of a blackout and argued that, if plaintiff had blackouts, then he had been negligent in boarding a motorcycle, knowing of his susceptibility, and also because he was unfamiliar with the operation of the particular model of motorcycle.

The injuries which plaintiff incurred in the second accident were extremely severe. His spinal cord was severed, resulting in total quadriplegia.

The jury found that the defendant's negligence with regard to the shipboard accident was a proximate cause of

the motorcycle accident and that plaintiff's damages were $455,216.67. However, the jury found further that plaintiff was contributorily negligent as to the motorcycle accident and that 59.64 percent of plaintiff's damages were attributable to such contributory negligence. Applying this percentage the jury rendered a verdict for plaintiff for the second accident in the sum of $183,725.45.

I.

On this appeal defendant relies chiefly[2] on the claim that the district court erred in not instructing the jury on the issue of "foreseeability" with respect to the second accident. The word "foreseeability" has a number of different meanings in the law of torts and the concept is one of variable and shifting content.

We can derive the meaning which the defendant attaches to the word from his argument that the second accident was not foreseeable because, as the jury found, intervening negligence of the plaintiff contributed to that accident. If foreseeability is a material element of the plaintiff's case then this argument would require granting judgment for the defendant as a matter of law. But defendant also argues, somewhat inconsistently, that whether plaintiff's intervening negligence would make the second accident unforeseeable is a question of fact for the jury under proper instructions.

In charging the jury the court separately discussed the unseaworthiness and negligence theories of liability. As to

[2]Defendant also objects to plaintiff's counsel's having read to the jury in his summation a doctor's report that was not in evidence. The doctor had made two reports. Only the first report was in evidence, and the plaintiff's counsel read from the second. But since the second report said in substance what the doctor had stated on the stand, any error was harmless.

unseaworthiness the court indicated that the plaintiff was required to prove that any unseaworthiness was a proximate cause of injury to plaintiff, and proximate cause was defined as:

> "a direct causal connection between the ship's unseaworthiness and the plaintiff's injury. To constitute a proximate cause not only must the cause actually contribute to the result, but such a cause must not be a remote one. It is a cause which, in a natural and continuous sequence, unbroken by any efficient intervening cause, helps to produce the injury and without which the accident would not have happened."

But although in discussing the negligence theory the court reiterated that the plaintiff must show proximate causation, the definition previously used, which included the remoteness element, was not repeated. Instead the court stated only that:

> "Under the Jones Act, it is not necessary that defendant's negligence be the sole proximate cause of [the] injury. It is sufficient if defendant's negligence played any part, even the slightest, in producing the injury."

Defendant contends that the jury must have concluded that even though defendant's negligence was a remote cause separated from plaintiff's second injury by plaintiff's intervening negligence, plaintiff could recover under the negligence claim if defendant's negligence played any part at all in producing the injury. We agree with defendant that the charge withdrew from the jury the question of remoteness of damages with respect to the negligence claim. We believe, however, that the district court was correct in its conclusion that the employee's negligence was not an intervening efficient cause breaking the chain of proximate causation.

We think that the proper analysis for FELA and Jones Act cases is contained in *Rogers* v. *Missouri Pacific R.R. Co.*, 352 U. S. 500 (1957). In that case the courts below had reversed a jury verdict for the employee on the ground that the accident was the result of an emergency brought about by the employee's inattention. Noting that the state court's opinion could be interpreted as holding that if the employee's conduct was at least as probable a cause for his mishap as any negligence of the respondent the employee could not recover, the Supreme Court held that the jury's function had been improperly invaded. The test of a jury case, said the Court, was:

> "simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought. It does not matter that, from the evidence, the jury may also with reason, on grounds of probability, attribute the result to other causes, including the employee's contributory negligence" (352 U. S. at 506).

It was of course this statement that was the source of the jury charge in the present case. Although *Rogers* did not involve a subsequent accident, we think it excludes in Jones Act cases the application of causation analysis to limit liability for remote damages.

It is well established that the intervening negligence of a third party is not sufficient to insulate the original actor from liability on grounds of unforeseeability. *Fredericks* v. *American Export Lines*, 227 F. 2d 450 (2d Cir. 1955), cert. denied, 350 U. S. 989 (1956); *Slattery* v. *Marra Bros.*, 186 F. 2d 134, 136 (2d Cir.), cert. denied, 341 U. S. 915 (1951). In view of the liberal guidelines established by *Rogers* v. *Missouri Pacific R.R. Co.*, *supra*, and *Gallick* v. *Baltimore & Ohio R.R. Co.*, 372 U. S. 108 (1963), we think

that a Jones Act claimant's intervening negligence must be treated similarly. No distinction can be drawn between the negligence of a third party and that of a claimant in terms of either proximate causation in fact or foreseeability in fact. The only policy basis for a difference in treatment is that a claimant has less of an equitable claim for relief when his own negligence has contributed to his injuries than when the negligence of a third party is involved. This distinction may have a bearing in the application of a workmen's compensation act that does not permit apportionment of damages and thus presents a choice between complete recovery or no recovery, see *Sullivan* v. *B & A Constr., Inc.*, 307 N. Y. 161, 120 N. E. 2d 694 (1954). But we do not think it is applicable to a system such as the Jones Act in which contributory negligence may be considered in reduction of damages, since the purpose of such a system is precisely that of excluding the claimant's fault from the determination of the question of liability. In the present case plaintiff's negligence was accorded all the significance to which it was entitled when the jury reduced plaintiff's damages by 59.64%. Thus we hold that the lower court properly eliminated from the jury's consideration the question of remoteness of damages. See *Fredericks* v. *American Export Lines, supra;* Prosser, Torts, § 50 (2d ed. 1955).

II.

In his cross-appeal plaintiff argues that since the jury found that he was not negligent with regard to the shipboard accident it was improper to diminish the damage award solely because of his negligence in the second accident. That is, plaintiff contends that the doctrine of comparative negligence applies only to contributory negligence

at the commencement of the chain of causation. Although this point was not properly preserved by an objection to the jury instructions, see Fed. R. Civ. P. 51, we rule upon it since its decision was implicit in our analysis of the problem of remoteness of damages.

Neither the parties' research nor our own has disclosed any decision dealing with this question. Section 3 of the Federal Employers Liability Act, 35 Stat. 66 (1908), 45 U. S. C. § 53 (1958), which is incorporated by reference in the Jones Act, provides that:

> "the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee * * *"

On its face the statute would appear equally applicable whether the claimant's negligence occurs at the commencement or the end of the chain of causation. Moreover, were we to accept plaintiff's contention that the comparative negligence portion of the statute does not apply to the subsequent accident we would be hard put to it to hold that plaintiff could still reap the benefits of the portion of the statute that eliminates contributory negligence as a bar to recovery. In that event plaintiff would not be able to recover any of the damages attributable to the second accident. Since we conclude that the liberal policies of the Jones Act are best served by the apportionment of consequential damages on the basis of fault rather than by an all or nothing rule of liability, we hold that the reduction of plaintiff's damages because of his negligence in the second accident was proper.

We affirm the judgment of the court below.